A **SIN-KUNG LOGISTICS (KL) SDN BHD v. PROJEK LEBUHRAYA USAHASAMA BHD**

COURT OF APPEAL, PUTRAJAYA
IDRUS HARUN JCA
YEOH WEE SIAM JCA
B RHODZARIAH BUJANG JCA
[CIVIL APPEAL NO: B-02(W)-1920-09-2017]
11 JUNE 2019

C ***ROAD TRAFFIC:*** *Road – Highway – Payment of toll – Claim for unpaid toll – Lorries passed through toll booth without paying toll – Whether toll charges should have been collected from lorry drivers and lorry drivers would be reimbursed by employer – Whether employer vicariously liable for violation of lorry drivers – Whether failure to pay toll proven – Federal Roads (Private Management) Act 1984, ss. 2(1), 8(1) & (2)*

D ***TORT:*** *Vicarious liability – Employer – Claim for unpaid toll – Lorries passed through toll booth without paying toll – Whether toll charges should have been collected from lorry drivers and lorry drivers would be reimbursed by employer – Whether employer vicariously liable for violation of lorry drivers – Whether lorry drivers on duty when offences committed – Whether failure to pay toll proven –* E *Federal Roads (Private Management) Act 1984, ss. 2(1), 8(1) & (2)*

The respondent's ('plaintiff') claim was premised on the unpaid tolls by 19 lorries registered under the appellant's ('defendant') name, using the tolls at the North South Expressways. The plaintiff's authority to collect tolls was provided under s. 2(1) of the Federal Roads (Private Management) Act 1984 F ('the Act'). The defendant's ownership of the vehicles were not facts in dispute and neither was the fact that they were used by the defendant's employees in the course of their employment. The defendant's main defence to disclaim liability was that the tolls should be collected from their lorry drivers and that those drivers had been reimbursed by them for the payment G of the tolls. The plaintiff's claim was substantiated by a documentary evidence known as PV Form ('the Form') which was filled up by the toll operators upon any violation at the toll booth. The Form contained crucial information on the date, time, place of incident as well as the registration number of the vehicle committing the transgression and the amount of unpaid H tolls. The Form was signed by the toll booth operator on duty at that material time and co-signed by the supervisor. The amount claimed by the plaintiff was substantiated by 5,390 of the Forms, and altogether, 570 witnesses were supposed to be called to tender the Forms before the court. However, only 122 witnesses were called because the High Court Judge ('HCJ') was of the I view there would be massive wastage of judicial time in hearing all the witnesses who would be giving the same evidence, the primary evidence being the Forms. Further, the HCJ stated that s. 73A of the Evidence Act 1950 allows primary documents to be tendered without the necessity of

calling the maker and proceeded to hear the evidence adduced from the sole witness of the defendant, who produced a record of all the toll payments made by the defendant's drivers and for which refunds had been made based on the receipts issued by the plaintiff's toll booths operators. The HCJ was of the view that the employer was liable vicariously for any wrongdoing of its employee unless the statute itself absolves the employer from liability and in this case, the defendant was held to be vicariously liable for the violation of its drivers if it was proven that the drivers had failed to pay or had not paid the full amount of the toll. The HCJ accepted the accuracy of the contents of the Forms over the receipts produced by the defendant and held the plaintiff's claim had been proven on a balance of probabilities. The issues raised by the defendant in this appeal were: (i) on the application of s. 73A of the Evidence Act 1950; and (ii) on the principle of vicarious liability, both of which were alleged to have been wrongly applied by the HCJ.

Held (dismissing appeal with costs)
Per Rhodzariah Bujang JCA delivering the judgment of the court:

(1) Section 73A(2) of the Evidence At 1950 clearly gave the court the power to admit the Forms as documentary evidence without calling their makers. In this case, it was not just a question of a few witnesses going to be called to tender the Forms but hundreds of them and to give evidence on a very mundane issue of whether the tolls had been paid, which was for a paltry sum. The amount stated in one PV Form represented a fraction of the debt claimed by the plaintiff, nonetheless the calling of hundreds of these witnesses would definitely cause undue delay to the completion of the trial. Given the peculiarity of the evidence in support of the claim which was the Forms and the standard information contained therein, their admission without calling for their respective makers was permissible under s. 73A. Admittedly, the defendant, by that course of action, had been denied the right to cross-examine the witnesses, but it did not infringe the rule of natural justice. (paras 17 & 18)

(2) As for the fact that some of the toll booth operators were unable to see the registration number of the lorries when shown the CCTV taken at the scene, it was not fatal to the plaintiff's case because the recordings were merely corroborative evidence, the primary one being the Forms themselves which was recorded on the spot by their makers. Further, the defendant's complaint that the HCJ had ignored the production of the original toll receipts as proof of payments by the defendant was misplaced because the evidence was considered by the HCJ. Hence, the findings of the HCJ on this issue was confirmed. (paras 19 & 20)

(3) There could be no argument that by reason of s. 2(1) of the Act, the right of the plaintiff to collect toll from the users of the highway or road for which the concession was given to them or that, by virtue of s. 8(1) and (2) of the Act, the user would commit an offence and incurred a penalty when no such payment of the toll is made and that the plaintiff, as the concessionaire, could recover the unpaid toll by an action in law. By the operation of s. 8(1) of the Act, payment of the toll is one which is statutorily provided for in the Act. It is an entrenched part of the principle of vicarious liability that an employer could only be made liable for the act of his employee committed during or in the course of employment. There was never any denial that the defendant's lorry drivers were on duty at that material time when the offences were committed. Therefore, the raising of the principle as a basis to sue the defendant in this case was fully justified. (paras 21 & 22)

Bahasa Malaysia *Headnotes*

Tuntutan responden ('plaintif') adalah berasaskan pada tol-tol tidak berbayar oleh 19 lori yang didaftarkan bawah nama perayu ('defendan'), menggunakan tol-tol di Lebuhraya Utara Selatan. Kuasa plaintif untuk mengutip tol-tol itu diperuntukkan bawah s. 2(1) Akta Jalan-Jalan Persekutuan (Pengurusan Persendirian) 1984 ('Akta'). Pemilikan kenderaan-kenderaan oleh defendan bukan fakta yang dipertikaikan dan juga fakta bahawa kenderaan-kenderaan tersebut digunakan oleh pekerja-pekerja defendan dalam menjalankan kerja mereka juga tidak dipertikaikan. Pembelaan utama defendan dalam penafian liabiliti adalah bahawa tol-tol tersebut sepatutnya dikutip daripada pemandu-pemandu lori mereka dan pemandu-pemandu lori itu telah dibayar balik oleh mereka untuk tol-tol tersebut. Tuntutan plaintif disokong keterangan dokumentar yang dikenali sebagai Borang PV ('Borang') yang diisi oleh operator tol atas apa-apa pelanggaran di pondok tol. Borang tersebut mengandungi maklumat penting tentang tarikh, masa, tempat insiden berlaku serta nombor pendaftaran kenderaan yang melakukan pelanggaran dan jumlah tol tidak berbayar. Borang itu ditandatangani oleh pengendali pondok tol bertugas pada masa material dan ditandatangani bersama oleh penyelia. Jumlah yang dituntut plaintif disokong oleh sejumlah 5,390 Borang dan keseluruhannya, 570 saksi sepatutnya dipanggil untuk mengemukakan Borang-borang tersebut di mahkamah. Walau bagaimanapun, hanya 122 saksi dipanggil kerana Hakim Mahkamah Tinggi ('HMT') berpendapat ini akan mengakibatkan pembaziran banyak masa kehakiman untuk mendengar kesemua saksi yang akan memberi keterangan yang sama, yang keterangan utamanya adalah Borang tersebut. Selanjutnya, HMT menyatakan bahawa s. 73A Akta Keterangan 1950 membenarkan dokumen utama dikemukakan tanpa keperluan memanggil pembuatnya dan meneruskan mendengar keterangan yang dikemukakan oleh satu-satunya saksi defendan, yang mengemukakan rekod kesemua bayaran tol yang dibuat oleh pemandu-pemandu defendan dan untuk pembayaran balik yang dibuat berdasarkan

resit-resit yang dikeluarkan oleh pengendali pondok tol plaintif. Hakim Mahkamah Tinggi berpendapat bahawa majikan bertanggungan secara vikarius terhadap apa-apa salah laku pekerjanya kecuali statut yang mengecualikan majikan daripada liabiliti dan dalam kes ini, defendan diputuskan bertanggungan secara vikarius terhadap pelanggaran pemandu-pemandunya jika dibuktikan bahawa pemandu-pemandu tersebut gagal membayar atau tidak membayar jumlah keseluruhan tol tersebut. Hakim Mahkamah Tinggi menerima ketepatan kandungan Borang-borang tersebut berbanding resit yang dikemukakan oleh defendan dan memutuskan tuntutan plaintif dibuktikan atas imbangan kebarangkalian. Isu-isu yang dibangkitkan defendan dalam rayuan ini adalah: (i) penggunaan s. 73A Akta Keterangan 1950; dan (ii) prinsip liabiliti vikarius, yang kedua-duanya didakwa diguna pakai secara khilaf oleh HMT.

Diputuskan (menolak rayuan dengan kos)
Oleh Rhodzariah Bujang HMR menyampaikan penghakiman mahkamah:

(1) Seksyen 73A(2) Akta Keterangan 1950 jelas memberi mahkamah kuasa menerima masuk Borang-borang tersebut sebagai keterangan dokumentar tanpa memanggil pembuatnya. Dalam kes ini, bukan hanya beberapa saksi yang akan dipanggil untuk mengemukakan Borang-borang tersebut tetapi ratusan mereka dan keterangan yang akan diberi atas isu yang biasa iaitu sama ada tol telah dibayar, yang adalah jumlah yang tidak seberapa. Jumlah yang dinyatakan dalam Borang PV mewakili satu peratus kecil yang dituntut plaintif, tetapi memanggil ratusan saksi pasti akan mengakibatkan kelewatan tidak wajar untuk mengakhiri perbicaraan. Berdasarkan ciri khusus keterangan menyokong tuntutan, iaitu Borang-borang tersebut dan keseragaman maklumat yang terkandung dalamnya, penerimaan masuk Borang-borang itu tanpa memanggil pembuatnya adalah dibenarkan bawah s. 73A. Diakui bahawa defendan, melalui tindakan tersebut, telah dinafikan hak memeriksa balas saksi-saksi, tetapi itu tidak melanggar kaedah keadilan asasi.

(2) Berkaitan fakta bahawa beberapa operator pondok tol tidak berupaya melihat nombor pendaftaran lori-lori tersebut apabila ditunjukkan CCTV yang diambil di tempat kejadian, itu tidak menjejaskan kes plaintif kerana rakaman-rakaman tersebut hanyalah keterangan sokongan, keterangan utama adalah Borang-borang itu sendiri yang direkodkan pada masa itu oleh pembuatnya. Selanjutnya, aduan defendan bahawa HMT tidak mengendahkan pengemukaan resit tol asal sebagai bukti pembayaran oleh defendan adalah satu salah tanggapan kerana keterangan itu telah pun dipertimbangkan oleh HMT. Oleh itu, dapatan HMT atas isu ini disahkan.

(3) Tidak boleh dipertikaikan bahawa melalui s. 2(1) Akta, hak plaintif untuk mengutip tol adalah daripada pengguna-pengguna lebuh raya atau jalan yang konsesi diberi kepada mereka atau, menurut s. 8(1) dan (2) Akta, pengguna akan melakukan kesalahan dan dikenakan denda apabila tol tidak dibayar dan plaintif sebagai pemegang konsesi akan mendapatkan semula tol tidak berbayar melalui tindakan undang-undang. Berdasarkan s. 8(1) Akta, bayaran tol diperuntukkan secara statutori dalam Akta. Bahagian termaktub dalam prinsip liabiliti vikarius adalah bahawa majikan hanya boleh dipertanggungkan terhadap tindakan pekerjanya yang dilakukan semasa atau dalam menjalankan kerja. Tidak pernah dinafikan bahawa pemandu-pemandu lori defendan bertugas pada masa material apabila kesalahan-kesalahan itu dilakukan. Oleh itu, membangkitkan prinsip tersebut sebagai asas untuk menyaman defendan dalam kes ini jelas mempunyai justifikasi.

Case(s) referred to:

Chandran G Nair & Ors. v. Affink Bank Bhd [2014] 8 CLJ 434 CA ***(refd)***

Majrowski v Guy's And St Thomas's NHS Trust [2005] QB 848 ***(refd)***

Projek Lebuhraya Utara-Selatan v. Permas Forwarding Agency Sdn Bhd [2013] 1 LNS 1529 CA ***(foll)***

Ramasamy Amaippan v. Kwan Lee Pin; Majlis Peguam Malaysia (Intervener) [2018] 3 CLJ 336 CA ***(dist)***

Legislation referred to:

Evidence Act 1950, s. 73A(1), (2)(a)

Federal Roads (Private Management) Act 1984, ss. 2(1), 8(1), (2)

For the appellant - Diana Ling & Elaine Gan; M/s Elaine & Diana

For the respondent - Krishna Dallumah, T Thirunaaukarasu & K Jegathis Kumar; M/s Thiru Jegatish & Assocs

[Editor's note: For the High Court judgment, please see Projek Lebuhraya Usahasama Bhd v. Sin-Kung Logistics (KL) Sdn Bhd [2018] 2 CLJ 501 (affirmed).]

Reported by S Barathi

JUDGMENT

Rhodzariah Bujang JCA:

[1] The appellant, the defendant in the High Court, was sued under the tort of vicarious liability by the respondent/plaintiff for partial and/or full evasion of payments of tolls at the express highways, used by the appellant's lorry drivers. The respondent was the concession holder of the said express highways and was given full authority under the Federal Roads (Private Management) Act 1984 to collect toll from users of the said highways. Hereinafter, in this judgment the parties would be referred to as they were in the High Court. This is in part to facilitate a better understanding of our reasons for dismissing the appeal against the High Court's decision to allow

the claim of the plaintiff in the sum of RM518,369.27 because there was a history of litigation between the parties prior to this decision of the High Court which was on appeal before us.

Litigation History

[2] This was briefly set out by the learned High Court Judge in his grounds of judgment and he was actually the second judge to hear the case. The first High Court Judge, after hearing 65 witnesses dismissed the plaintiff's claim on 6 February 2014 before the conclusion of the trial which His Lordship did based on this court's decision in *Projek Lebuhraya Utara Selatan v. Permas Forwarding Agency Sdn Bhd* [2013] 1 LNS 1529; [2014] 2 MLJ 893 which held that the above-mentioned principle of vicarious liability does not apply to vehicle owners and that toll payments could only be collected from the users of the highway by the plaintiff who was highway concessionaire. That decision of the first learned High Court Judge was reversed by this court on 25 September 2014 and the High Court was ordered to resume the trial of the action. An application for leave to appeal to the Federal Court by the defendant was rejected.

[3] The said trial did not resume thereafter in the High Court because the first learned High Court Judge transferred the case to the Sessions Court given that the monetary amount claimed was within its jurisdiction under the new Rules of Court 2012. This decision was reversed by this court on appeal and it was only upon that reversal that the trial was continued before the learned High Court Judge who then heard another 122 witnesses before coming up with the decision which was on appeal before us. We heard the appeal on 19 March 2018 and dismissed the same with cost to the plaintiff. The defendant then filed an application for leave to appeal to the Federal Court and this judgment is written pursuant to a directive issued by the Federal Court for it be written for the purpose of that leave application.

The Claim

[4] The plaintiff's claim was premised on the unpaid tolls by 19 lorries registered under the defendant's name, using the tolls at the North South Expressways. The plaintiff's authority to collect the said tolls is provided under s. 2(1) of the Federal Roads (Private Management) Act 1984 ("the Act") and the defendant's ownership of the said vehicles were not facts in dispute before the High Court and us and neither was the fact that they were used by the defendant's employees in the course of their employment. The defendant's main defence to disclaim liability was that the said tolls should be collected from their lorry drivers and that those drivers had been reimbursed by them for the payment of the said tolls. The plaintiff's claim was substantiated by a documentary evidence known as PV form ("the form") which was filled up by the toll operators upon any violation at the toll booth. The Form contained crucial information on the date, time, place of incident as well as the registration number of the vehicle committing the

transgression and the amount of unpaid tolls. The Form was signed by the toll booth operator on duty at that material time and co-signed by the supervisor.

[5] The amount claimed by the plaintiff was substantiated by 5,390 of the Forms and altogether 570 witnesses were supposed to be called to tender the Forms before the court. However, as stated earlier, only 122 witnesses were called and this was because the learned High Court Judge was of the view that since it was indicated to him that the remaining witnesses would be giving the same evidence as the earlier ones and that the primary evidence being the Forms which were produced before the court, it would be a sheer waste of judicial time to hear the rest of the witnesses who had been subpoenaed. This was what His Lordship said at para. [18] of his judgment:

> There would be massive wastage of judicial time in going through the motion of hearing all the 570 witnesses given the same answers to the same questions. As a record the Court noted that only a maximum of 25 witnesses could be called a day. Wastage of time is not a prime consideration but a factor which the Court can take into account in deciding upon a case.

[6] Further, His Lordship said s. 73A of the Evidence Act 1950 allows primary documents to be tendered without the necessity of calling the maker to the court. Relevant to this appeal is s. 73A(1) and (2)(a) and the same are produced below:

> (1) Notwithstanding anything contained in this Chapter, in any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied:
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> (a) if the maker of the statement either:
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> (i) had personal knowledge of the matters dealt with by the statement; or
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> (ii) where the document in question is or forms part of a recording purporting to be a continuous record, made the statement (so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have had, personal knowledge of those matters; and
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> (b) if the maker of the statement is called as a witness in the proceedings:
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> Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, nor unfit by reason of his bodily or mental condition to attend

as a witness, or if he is beyond the seas and it is not reasonably practicable to secure his attendance, or if all reasonable efforts to find him have been made without success.

(2) In any civil proceedings, the court may at any stage of the proceedings, **if having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused,** order that such a statement as is mentioned in subsection (1) shall be admissible as evidence or may without any such order having been made, admit such a statement in evidence:

(a) **notwithstanding that the maker of the statement is available but is not called as a witness;** (emphasis added)

[7] The learned High Court Judge then proceeded to hear the evidence adduced from the sole witness of the defendant who produced a record of all the toll payments made by the defendant's drivers and for which refunds have been made based on the receipts issued by the plaintiff's toll booths operators.

Findings Of The Learned High Court Judge

[8] Two were made by the learned High Court Judge. The first and major one was on the doctrine of vicarious liability and His Lordship decided not to follow this court's decision in *Projek Lembaga Lebuhraya Utara Selatan Berhad's* case *(supra)* but relied on that made by this court in ordering the trial to resume because in para. [8] of the latter judgment, this court appears to adopt a contrary decision from the earlier one. The said para. [8] reads as follows:

[8] It is also not clear from the Court of Appeal judgment if the defendant had authorised the employees to use the express highway and if so, whether the defendant will be obliged to pay the toll charges if the employees had not paid the toll charges at common law, and whether if the court condones such non-payment will result in unjust enrichment to the defendant.

[9] His Lordship then concluded on this issue by saying as follows:

31. Reading in between the 2 Court of Appeal decisions it can be inferred that the 2 decisions are not in tandem and therefore this Court is at liberty to rely on any one of them. In this case the Court agrees with the second Court of Appeal decision which states that vicarious liability is a common law concept. This Court notes that the common law principle of vicarious liability was in existence even before any statutory provision to collect revenue. It therefore follows that the House of Lord decision in *Majrowski*'s case *(supra)* is better statement of law that the general rule that the employer is liable vicariously for any wrongdoing of its employee unless the statute itself absolves the employer from liability.

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32. In this case the Act does not in any way absolve the employer from vicarious liability and in fact the phrase "user" should include the employer as the actual user of the highway is the vehicle which belongs to the Defendant. The drivers are merely employed to facilitate the business of the Defendant by driving the vehicles. Section 8 of the Act allows apart from imposing a criminal penalty to allow the tolls not paid to be recovered for the use of the road.

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33. The Court therefore rules that the Defendant is vicariously liable for the violation of its drivers if it is proven that the drivers have failed to pay or have not paid the full amount of the toll.

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[10] The word "user" referred to by the learned High Court Judge is derived from the word 'uses' in s. 8(1) of the Act which is reproduced below with sub-s. 2:

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(1) Any person who **uses** or attempts to use any road, bridge or ferry in respect of which an order under section 2 has been made without payment of the tolls prescribed in the order shall be guilty of an offence and shall, on conviction, be punished with a fine of not less than two thousand ringgit and not more than five thousand ringgit.

(2) Notwithstanding subsection (1) tolls due and payable by virtue of an order made pursuant to section 2 may be recoverable by action at law by the person so authorised under the said section. (emphasis added)

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[11] In respect of the second issue on the payment of the toll, the learned High Court Judge considered the receipts of payment of the tolls tendered by the defendant and observed that the vehicle registration numbers were not printed on the receipts. Therefore, the defendant cannot disprove that payments were not made as stated in the Forms although some of the receipts

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bore the same date and time of the violation as stated in the Forms. However, the learned High Court Judge held that this does not mean that the information in the Forms was wrong for the receipts could have been obtained by the defendant's drivers elsewhere. The learned High Court Judge then said that he accepted the accuracy of the contents of the Forms over the

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receipts produced by the defendant and therefore the plaintiff's claim had been proven on a balance of probabilities.

[12] Before concluding, His Lordship dealt with this one last matter on the payment of the tolls and it is as follows:

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A final matter on the payment of toll was the contention of the Defendant that on the date of the alleged violation the Plaintiff had issued receipts for many of the vehicles showing full payment. This matter was explained by the Plaintiff's witnesses that not all the drivers of the Defendant's drivers committing the violation had driven through the toll booth without stopping. There were many of the Defendant's drivers who

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had stopped and given the toll ticket to the toll booth operators which were then fed by the toll both operators into their computer system. Once the ticket had been put into the computer the toll operators had to complete the transaction regardless of whether the toll had been paid or

not. This was the reason the receipt which was subsequently issued showed full payment. This full payment was only on paper. The Court accepted this explanation given by the Plaintiff's witnesses.

The Appeal

[13] Before us, two issues were raised by learned counsel for the defendant. The first is on the application of s. 73A of the Evidence Act 1950 and the second on the principle of vicarious liability both of which she contended have been wrongly applied by the learned High Court Judge.

First Issue: Section 73A

[14] It was not disputed that the Forms were in Part C of the plaintiff's bundle of documents or that their makers were available to testify on the said documents. In other words, both their authenticity and content were disputed at the trial. Learned counsel for the defendant submitted that admitting the rest of the said documents without their makers being called had deprived the defendant of their right to cross-examine them and was a breach of natural justice even though the cross-examination of the said witnesses could be similar with the ones who had previously been called to testify and were cross-examined. These documents, submitted learned counsel further were crucial because each one constitutes a debt to be paid and the learned High Court Judge's reliance on this court's decision in *Chandran G Nair & Ors v. Affink Bank* [2014] 8 CLJ 434 to support his use of the said s. 73A was wrong.

[15] In the said cited case, the issue was on the admissibility of the certificate of indebtedness relied upon by the respondent to prove the damages it sought against the appellant but the maker of that certificate was not called as a witness by the respondent which therefore rendered it inadmissible held this court. This court, after holding so further opined, at para. [35] of the judgment as follows:

> [35] It is significant to note that for some untold reason the respondent did not at any time attempt to rely on the provisions of s. 73A(2), which provides:
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> > (2) In any civil proceedings, the court may at any stage of the proceedings, if having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused, order that such a statement as is mentioned in subsection (1) shall be admissible as evidence or may, without any such order having been made, admit such a statement in evidence:
> >
> > (a) notwithstanding that the maker of the statement is available but is not called as a witness; and
> >
> > (b) notwithstanding that the original document is not produced, if, *in lieu* thereof, there is produced a copy of the original document or of the material part thereof certified to be a true copy in such manner as may be specified in the order or as the court may approve, as the case may be.

A If indeed the respondent was in such a position. For the learned trial judge to act under s 73A(2) it would have been imperative for the respondent to move the court to do so.

[16] Learned counsel for the defendant after referring to this decision in para. 22 of their written submission, then said this at para. 23:

B 23. By adopting the above principles into our present case, there was no conclusive evidence agreement made between the Plaintiff and the Defendant, hence the learned Judge is erred by accepting the PV forms as conclusive proof of violation and subsequently debts to be collected from the Defendant. *(sic)*

C **[17]** With respect to learned counsel, we do not agree that the said section can only be utilised by the court only if there was a conclusive evidence agreement between the parties as in *Chandran*'s case *(supra)*. The said s. 73A(2) clearly gave the court the power to admit the Forms documentary evidence without calling their makers "… if having regard to all the D circumstances of the case it is satisfied that undue delay or expense would otherwise be caused …". We can see and appreciate where the learned High Court Judge was coming from for it was not just a question of a few witnesses going to be called to tender the Forms but hundreds of them and to give evidence on a very mundane issue of whether the tolls had been paid and if E we may add, which was for a paltry sum. Admittedly, the amount stated in one PV Form represented a fraction of the debt claimed by the plaintiff, nonetheless the calling of hundreds of these witnesses would definitely cause undue delay to the completion of the trial. The learned High Court Judge, we must add had pertinently noted the evidence from all the 122 witnesses called that the Forms were filled up immediately after the transgression being F committed and it took only 2-3 minutes for them to fill it up whilst the other vehicles behind would wait. Equally important is what His Lordship noted at the next paras. [13]-[15] of the grounds of judgment as follows:

13. All the 122 witnesses were also firm in their answers that they had noted the number plates on the PV form having seen the number G plates when the vehicle entered and exited the toll booth. Some of the witnesses saw the number plate once on entry or exit but all confirmed seeing number plate clearly. Further all the 122 witnesses testified that the toll booth were well lighted and they could clearly see the number plates when challenged by the Defendant's counsel H that as many of the incident of violation occurred early in the morning they could not have been the number plates clearly.

14. All the 122 witnesses were also consistent in stating that they could not remember the weather condition at the time of violation or the colour of the vehicle or the details of the drivers apart from what had been noted in the PV form due to lapse of time and memory. I

15. It was indicated to the Court that the same questions would be posed to all the other remaining witnesses by the Defendant's counsel as all of them were also toll booth operators carrying out

> the same duties as the 122 witnesses. The Court could not envisage that these other witnesses would drastically depart from the answers given by the 122 witnesses. It is pertinent to note that the Defendant did not challenge the fact that the toll booth operators had filled up the PV forms, the challenge was more as to accuracy of the information contained therein.

[18] Therefore, given the peculiarity of the evidence in support of the claim in this case which was the Forms and the standard information contained therein, their admission without calling for their respective makers was in our view permissible under the said s. 73A. Admittedly the defendant, by that course of action had been denied the right to cross-examine the witnesses but that in our view does not infringe the rule of natural justice because it is not the same situation as in the case of *Ramasamy Amaippan v. Kwan Lee Pin; Majlis Peguam Malaysia (Intervener)* [2018] 3 CLJ 336; [2017] MLJU 783 quoted by the defendant's counsel. In the cited case, the respondent accused the appellant (her solicitor) of failing to return to her an overpayment of RM51,500 relating to the purchase of a house and also lodged a police report against him but did not turn up at the hearing before the Advocates and Solicitors Disciplinary Board. Instead, she sent her husband to testify at the hearing. The said Board after the hearing recommended that the appellant be suspended from practice for 12 months and ordered him to pay the respondent the said sum of RM51,500. It is crystal clear that the facts in the cited case is distinguishable from the present one for there was just one accuser and the whole case rested on her allegation against her solicitor. To reiterate, the evidence of the toll booth operators in this case, would be repetitive and we said this because from our own examination of notes of proceeding we have no cause to disagree with the learned High Court Judge that it would be so, even when there exist some differences in some of the cross-examination of the toll booth operators.

[19] As for the fact that some of the toll booth operators were unable to see the registration number of the lorries when shown the CCTV taken at the scene, that is not fatal to the plaintiff's case because these recordings are merely corroborative evidence, the primary one being the Forms themselves which, we must stress, was recorded on the spot by their makers.

[20] As for the production of the original toll receipts by the defendant which were tendered in court, the defendant's complaint that the learned High Court Judge had ignored these proof of payments is, with respect, quite misplaced because he did consider them as per para. [37] of His Lordships judgment which we had reproduced earlier. On these considerations, we would affirm the findings of the learned High Court Judge on this issue.

A

Vicarious Liability

[21] There can be no argument that by reason of s. 2(1) of the Act, the right of the plaintiff to collect toll is from the users of the highway or road for which the concession was given to them or that by virtue of s. 8(1) and (2) of the said Act, the said user would commit an offence and incurred a penalty when no such payment of the toll is made and that the plaintiff as concessionaire can recover the unpaid toll by an action in law. As stated earlier, the learned High Court Judge relied on the decision of an English Court of Appeal in *Majrowski v. Guy's And St Thomas's NHS Trust* [2005] QB 848 held that:

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C

> An employer may be vicariously liable for a breach of a statutory duty imposed on an employee but not on the employer.

[22] By the operation of s. 8(1) of the Act, payment of the toll is one which is statutorily provided for in the Act as stated earlier. It is an entrenched part of the said principle of vicarious liability that an employer can only be made liable for the act of his employee committed during or in the course of employment and there was never any denial that the defendant's lorry drivers were on duty at that material time when the offences were committed. Therefore the raising of the principle as a basis to sue the defendant in this case, we would agree with the learned High Court Judge, was fully justified and in saying so we endorsed the view of this court in its later decision in *Project Lebuhraya*'s case *(supra)*.

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[23] On the considerations above, the appeal by the defendant was dismissed with cost by us on 19 March 2018.

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